Supreme Court, U.S.
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No. 01-

IN THE

Supreme Court of the United States

ANTONIO ALANIS,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

The Court of Appeals for the Seventh Circuit found that the defendant's sentence constituted a violation of *Apprendi v. New Jersey*, 530 U.S. 466, 120 S. Ct. 2348, 147 L. Ed. 2d 435 (2000), in that the quantity of drugs was never determined by the jury. When a clear *Apprendi* violation is found on appeal, does the application of an appellate review under the plain error standard constitute a violation of due process in light of: (1) the *Apprendi* requirement that a fact that increases the penalty beyond the statutory maximum must be submitted to a jury and proved beyond a reasonable doubt; (2) the statutory requirement of 18 U.S.C. § 3742(f)(1) that a sentence imposed in violation of law shall be remanded for further sentencing and (3) the fact that all elements of a plain error standard are present in an *Apprendi* violation?

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The opinion of the United States Court of Appeals for the Seventh Circuit is attached as Appendix A. The opinion of the United States District Court for the Northern District of Indiana is attached as Appendix B.

STATEMENT OF JURISDICTION

The jurisdiction of this Court is based on 28 U.S.C. § 1254(1). The jurisdiction of the United States Court of Appeals for the Seventh Circuit was based on 28 U.S.C. § 1291.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The relevant portion of Amendment V of the United States Constitution provides that no person shall "be deprived of life, liberty, or property, without due process of law".

Amendment VI of the United States Constitution:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining Witnesses in his favor, and to have the assistance of counsel for his defense.

21 U.S.C. § 841(a)(1):

> Except as authorized by this subchapter, it shall be unlawful for any person knowingly or intentionally —
>
> > (1) to manufacturer, distribute, or dispense, or posses with intent to manufacturer, distribute, or dispense, a controlled substance . . .

21 U.S.C. § 841(b)(1)(A):

> [A]ny person who violates subsection (a) of this section shall be sentenced as follows:
>
> > (1)(A) In the case of a violation of subsection (a) of this section involving . . .
> >
> > (ii) 5 kilograms or more of a mixture or substance containing a detectable amount of . . .
> >
> > (II) cocaine, its salts, optical and geometric isomers, and salts of isomers; . . .
>
> such person shall be sentenced to a term of imprisonment which may not be less than 10 years or more than life . . .

21 U.S.C. § 841(C):

> In the case of a controlled substance in schedule I or II, . . . such person shall be sentenced to a term of imprisonment of not more than 20 years . . .

21 U.S.C. § 846:

> Any person who attempts or conspires to commit any offense defined in this subchapter shall be subject to the same penalties as those prescribed for the offense, the commission of which was the object of the attempt or conspiracy.

STATEMENT OF THE CASE

On April 3, 2000, Petitioner Antonio Alanis was convicted in the United States District Court for the Northern District of Indiana of one count of conspiracy to distribute cocaine in violation of 21 U.S.C. § 846, one count of possession with intent to distribute marijuana in violation of 21 U.S.C. § 841(a)(1), two counts of possession with intent to distribute cocaine in violation of 21 U.S.C. § 841(a)(1), and two counts of being a felon in possession of a firearm in violation of 18 U.S.C. § 922(g). There was no actual drug quantity submitted to the jury and the jury verdict did not indicate any drug quantity. The district court judge found Mr. Alanis to have been in possession of an amount of cocaine in excess of 5 kilograms and more than 81.648 kilograms of marijuana. On August 4, 2000, Mr. Alanis was sentenced to a term of imprisonment of 468 months. [Appendix A, *infra*, p. 1a]

Mr. Alanis appealed his conviction and his sentence. He alleged that the sentence he received violated the rule set forth by the United States Supreme Court in *Apprendi v. New Jersey*, 530 U.S. 466, 120 S. Ct. 2348, 147 L. Ed. 2d 435 (2000), because it was more than the statutory maximum provided for his offense. The United States Court of Appeals for the Seventh Circuit agreed, indicating that because the drug quantity was not determined by the jury, he was sentenced in violation of the rule set forth in *Apprendi*. [Appendix A, *infra*, p. 17a to 18a]

The Circuit Court of Appeals then applied a plain error review, requiring Mr. Alanis to show not only plain error, but also that the error affected his substantial rights and seriously affected the fairness, integrity or public reputation of the judicial proceedings. The court found that there was "overwhelming" evidence that the drug quantity was sufficient to trigger the higher statutory maximums, and held that the *Apprendi* error did not require that Mr. Alanis be re-sentenced. [Appendix A, *infra*, p. 19a to 20a]

REASONS FOR GRANTING THE WRIT

1. This Court should settle the question of whether the determination that a defendant's sentence is a violation of the rule set forth in *Apprendi* requires that the case be remanded for re-sentencing under 18 U.S.C. § 3742(f)(1), especially since a further judicial review under a plain error standard is unnecessary as all elements of the plain error standard are present when there is an *Apprendi* violation.

2. The decision of the Court of Appeals for the Seventh Circuit is in conflict with the holdings of other circuit courts of appeal, requiring the exercise of this Court's supervisory powers.

I.

UNDER EXISTING LAW, A SENTENCE IMPOSED IN VIOLATION OF LAW MUST BE REMANDED FOR RE-SENTENCING; THEREFORE, A SENTENCE THAT IS THE RESULT OF AN UNCONSTITUTIONAL *APPRENDI* VIOLATION MUST BE REMANDED FOR RE-SENTENCING WITHOUT FURTHER JUDICIAL REVIEW UNDER A PLAIN ERROR STANDARD, ESPECIALLY SINCE ALL THE ELEMENTS OF PLAIN ERROR ARE PRESENT IN AN *APPRENDI* VIOLATION

In *Apprendi v. New Jersey*, 530 U.S. 466, 120 S. Ct. 2348, 147 L. Ed. 2d 435 (2000), this Court was faced with a guilty plea for second-degree possession of a firearm for an unlawful purpose, which carries a sentence of imprisonment for 5 to 10 years. The defendant had fired shots into the home of an African American family and had told the police that he had done it because the family was black, but he later recanted this statement. Under New Jersey's hate crime law, an extended term of imprisonment is provided for if the judge finds by a preponderance of the evidence that the defendant acted with a purpose to intimidate an individual or group of individuals because of race, color, gender, handicap, religion, sexual orientation, or ethnicity. The trial judge sentenced Apprendi to 10 years in prison for possession of a firearm for unlawful purposes. Finding that the defendant's crime was motivated by racial bias, the trial judge imposed an additional two years of imprisonment based on the hate crime law. The Appellate Division of the New Jersey Superior Court and the New Jersey Supreme Court affirmed the sentence, and the defendant filed a Petition for Certiorari to the United States Supreme Court, arguing that the Due Process Clause of the United States Constitution requires that this finding

of bias upon which his hate crime sentence was based must be proved to a jury beyond a reasonable doubt. The question before the Court was whether the 12-year sentence was permissible given that it was above the 10-year maximum for the offense charged, since it converted what was otherwise a maximum 10-year sentence into a minimum sentence. This Court noted that Justice Stevens, in his concurring opinion in *Jones v. United States*, 526 U.S. 227, 252-253, 119 S. Ct. 1215, 143 L. Ed. 2d 311 (1999), stated that "it is unconstitutional for a legislature to remove from the jury the assessment of facts that increase the prescribed range of penalties to which a criminal defendant is exposed", and that "[i]t is equally clear that such facts must be established by proof beyond a reasonable doubt." The Supreme Court went on to hold: "Other than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." 530 U.S. at 488, 120 S. Ct. at 2362-2363; 147 L. Ed. 2d at 455.

This Court explained that the constitutional protections at stake in the case are of surpassing importance: the Fourteenth Amendment's proscription of any deprivation of liberty without due process of law, and the Sixth Amendment's guarantee of the right to a trial by an impartial jury. The Court stated that taken together, these rights indisputably entitle a criminal defendant to a jury determination that he is guilty of every element of the crime with which he is charged, beyond a reasonable doubt. 530 U.S. at 476-477, 120 S. Ct. at 2355-2356, 147 L. Ed. 2d at 447. Thus, this Court held that it is a violation of due process and the Sixth Amendment to convict a defendant for one crime but to punish him for another.

This is exactly what occurred here. The jury never made a finding of the drug quantity beyond a reasonable doubt. The judge, not the jury, determined that the drug quantity was such that a sentence above the statutory maximum could be imposed. The Court of Appeals for the Seventh Circuit found that *Apprendi* was violated because the drug quantity was not submitted to the jury or proved beyond a reasonable doubt. The Court of Appeals then applied a plain error standard of review to determine if Mr. Alanis' sentence should be reduced. It is submitted that because the *Apprendi* violation means that a fact that increased the penalty was never proven beyond a reasonable doubt, further judicial review is not warranted. The government failed to prove beyond a reasonable doubt that the offense involved a quantity of drugs sufficient to mandate a higher penalty. Therefore, the imposition of the higher penalty violated due process.

The Due Process Clause protects those principles of justice "so rooted in the traditions and conscience of our people as to be ranked as fundamental." *Patterson v. New York*, 432 U.S. 187, 202, 97 S. Ct. 2319, 2322, 53 L. Ed. 2d 281 (1977); *Montana v. Egelhoff*, 518 U.S. 37, 71, 116 S. Ct. 2013, 2030, 135 L. Ed. 2d 361 (1996). In *Cole v. Arkansas*, 333 U.S. 196, 201, 68 S. Ct. 514, 517, 91 L. Ed. 644, this Court stated that "[i]t is as much a violation of due process to send an accused to prison following a conviction of a charge on which he was never tried as it would be to convict him on a charge that was never made."

In *In re Winship*, 397 U.S. 358, 364, 90 S. Ct. 1068, 25 L. Ed. 2d 368 (1970), this Court stated that the Due Process Clause "protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to

constitute the crime with which he is charged." This Court stated:

> The reasonable doubt standard plays a vital role in the American scheme of criminal procedure. It is a prime instrument for reducing the risk of convictions resting on factual error. The standard provides concrete substance for the presumption of innocence — that bedrock "axiomatic and elementary" principle whose "enforcement lies at the foundation of the administration of our criminal law." *Coffin v. United States*, [156 U.S. 432, 453 (1895)] . . .
>
> Moreover, the use of the reasonable doubt standard is indispensable to command the respect and confidence of the community in applications of the criminal law. It is critical that the moral force of the criminal law not be diluted by a standard of proof that leaves people in doubt whether innocent men are being condemned. It is also important in our free society that every individual going about his ordinary affairs have confidence that his government cannot adjudge him guilty of a criminal offense without convincing a proper factfinder of his guilt with utmost certainty.

Id.

In *Jackson v. Virginia*, 443 U.S. 307, 315-316, 99 S. Ct. 2781, 61 L. Ed. 2d 560 (1979), this Court stated that it has never departed from this definition of the rule or from the

Winship understanding of the central purposes it serves, explaining that

> [i]n short, *Winship* presupposes as an essential of the due process guaranteed by the Fourteenth Amendment that no person shall be made to suffer the onus of a criminal conviction except upon sufficient proof — defined as evidence necessary to convince a trier of fact beyond a reasonable doubt of the existence of every element of the offense.

Under *Apprendi*, the fundamental protection of due process applies to sentencing as well, since any fact that increases the penalty beyond the statutory maximum must be submitted to a jury and proved beyond a reasonable doubt. *See Jones v. United States*, *supra*, 526 U.S. at 243 n.6. Where the drug quantity is not submitted to the jury, there is no proof beyond a reasonable doubt as to the actual drug quantity involved in the offense. Under 21 U.S.C. § 841(b)(1)(C), the statutory maximum term for an offense where the drug quantity is not specified is twenty years. But the district court judge, not the jury, made the determination that the drug quantity involved was sufficient to impose a sentence of 39 years. This was a term in excess of the statutory maximum and constituted a violation of *Apprendi*. The *Apprendi* violation was acknowledged by the Seventh Circuit Court of Appeals.

But the Court of Appeals erred in then subjecting the sentence to a plain error review. Under 18 U.S.C. § 3742(f)(1), when a court of appeals determines that a sentence has been imposed in violation of law, the case must be remanded for re-sentencing. There is no provision in the

statute for further judicial review of any kind. Indeed, there is nothing in *Apprendi* that provides for a further judicial review of the unconstitutional sentence. Under *Apprendi*, the drug quantity must be submitted to a jury and proven beyond a reasonable doubt. A determination of drug quantity by a judge does not meet this requirement, and neither does an appellate review of the record. Therefore, the sentence should have been vacated and the case remanded to the district court for re-sentencing.

In any event, all of the elements of plain error are present in an *Apprendi* violation. Under *Johnson v. United States*, 520 U.S. 461, 465-466, 117 S. Ct. 1544, 137 L. Ed. 2d 718 (1997), and *United States v. Olano*, 507 U.S. 725, 732-736, 113 S. Ct. 1770, 123 L. Ed. 2d 508 (1993), plain error can be found if there is: (1) an error; (2) that is plain; and (3) that affects substantial rights, but only if the error also (4) seriously affects the fairness, integrity or public reputation of the judicial proceedings.

The district court committed error in imposing a sentence above the statutory maximum. This was acknowledged by the Court of Appeals. An error is plain if it is obvious or "clear under current law." *United States v. Olano*, *supra*, 507 U.S. at 734. Although *Apprendi* had not been decided at the time of the sentencing, this Court has held that where the error becomes obvious by the time of appellate consideration, even if the law at the time of trial was contrary, the second factor is satisfied. *Johnson v. United States*, *supra*, 520 U.S. at 468.

The next question is whether the *Apprendi* violation affects substantial rights. Because an *Apprendi* error affects only the penalty and not the trial itself, it is a sentencing

error that leads to the imposition of a term greater than that permitted under law. In *Glover v. United States*, 531 U.S. 198, 121 S. Ct. 696, 148 L. Ed. 2d 604 (2001), this Court held that an increase of six months in a defendant's sentence was prejudicial in relation to an ineffective assistance of counsel claim. This Court noted that "any amount of actual jail time has Sixth Amendment significance." 531 U.S. at 203. Thus, requiring a defendant to spend additional time in prison clearly affects his substantial rights.

With respect to the fourth element of a plain error review, it is clear that an *Apprendi* violation affects the sentence imposed on a defendant. In *Apprendi*, this Court stated that the sentencing differential was "more than a nominal effect" and that "in terms of absolute years behind bars, and because of the more severe stigma attached, the differential here is unquestionably of constitutional significance." 530 U.S. at 495. Clearly, a sentencing error of constitutional significance that requires a defendant to spend more time in prison than the statutory maximum time permitted for his offense seriously affects the fairness and integrity, as well as the public reputation, of the judicial proceedings.

Furthermore, the right to a jury trial and a determination of guilt beyond a reasonable doubt are the basis of our constitutional system of justice. *Apprendi*, 530 U.S. at 476-478, 120 S. Ct. at 2355-2356. Fairness is undermined when a court's error imposes a longer sentence than is permitted. The moral force of the criminal law is diluted when a standard of proof is utilized that leaves people in doubt as to whether a person is being punished for something that was not proven beyond a reasonable doubt by the proper factfinder.

The only possible remedy for an *Apprendi* violation is re-sentencing under 18 U.S.C. § 3742(f)(1). Once an *Apprendi* violation is found, no further judicial review is necessary, especially under the plain error standard.

II.

THE HOLDING OF THE COURT OF APPEALS FOR THE SEVENTH CIRCUIT CONFLICTS WITH HOLDINGS IN OTHER CIRCUITS, REQUIRING THE EXERCISE OF THIS COURT'S SUPERVISORY POWER

The Court of Appeals for the Seventh Circuit applied a plain error standard after finding an *Apprendi* violation and essentially held that the unconstitutional sentence did not affect substantial rights. However, in at least eight other circuits, when an *Apprendi* violation has been found at the appellate level, a court has vacated the sentence and remanded the case for re-sentencing within the statutory maximum authorized by the jury verdict.

In *United States v. McWaine*, 243 F.3d 871 (5th Cir. 2001), the sentence was vacated and the case remanded for re-sentencing because the life sentence for a cocaine offense exceeded the 20-year statutory maximum sentence authorized by the jury where there was a failure to submit the issue of drug quantity to the jury. In *United States v. Meshack*, 225 F.3d 556 (5th Cir. 2000), two life sentences were vacated and the case remanded where they were longer than the statutory maximum for offenses in which there was no drug quantity in issue. In *United States v. Martinez*, 253 F.3d 251 (6th Cir. 2001), the sentences were vacated and the case remanded for re-sentencing because the sentences exceeded the maximum sentence authorized by the jury verdict by

12 and 15 years, respectively. In *United States v. Ray*, 250 F.3d 596 (8th Cir. 2001), the sentence was remanded for re-sentencing because the 97-month sentence exceeded the statutory maximum by 60 months. In *United States v. Velazquez*, 246 F.3d 204 (2d Cir. 2001), the sentences were vacated and the case remanded for re-sentencing because the sentences exceeded by four months the statutory maximum that could be imposed without a jury determination as to cause of death. In *United States v. Jones*, 235 F.3d 1231 (10th Cir. 2000), the case was remanded for sentencing because the 30 year sentence exceeded the 20 year statutory maximum sentence authorized by the jury verdict. In *United States v. Nordby*, 225 F.3d 1053 (9th Cir. 2000), the case was remanded for re-sentencing because five additional years were imposed beyond that authorized by the verdict and thereby affected defendant's substantial rights. In *United States v. Angle*, 230 F.3d 112 (4th Cir. 2000), the sentence was vacated and the case remanded for re-sentencing because the sentence of 292 months exceeded the statutory maximum of 20 years where no drug quantity is charged in the indictment or found by a jury, but a jury has found a violation of § 841(a). In *United States v. Fields*, 242 F.3d 393 (C.A.D.C. 2001), it was held that where the drug quantities were determined by a judge at sentencing, the defendant's substantial rights were affected, requiring reversal.

Clearly, this disparity in handling *Apprendi* violations between the Seventh Circuit and other circuit courts requires the intervention of this Court in the exercise of its supervisory power.

CONCLUSION

This case presents a question of exceptional importance — whether the constitutional violation of imposing a sentence that is greater than the statutory maximum sentence permitted for the offense of which the defendant was convicted by the jury when the fact necessary to permit the greater sentence has not been proved beyond a reasonable doubt, as required by *Apprendi*, is to be remedied by re-sentencing with no further judicial review. By granting the petition for certiorari, this Court can correct the decision of the Seventh Circuit Court of Appeals, which conflicts with decisions in other circuits with respect to vacating the sentence and remanding for re-sentencing.

Accordingly, it is respectfully requested that the petition for certiorari be granted.

Respectfully submitted,

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APPENDIX

APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT DATED AND DECIDED SEPTEMBER 7, 2001

IN THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

No. 00-3073

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

ANTONIO ALANIS,

Defendant-Appellant.

Appeal from the United States District Court
for the Northern District of Indiana, South Bend Division.
No. 3:00CR0008 — **Robert L. Miller, Jr.**, *Judge.*

ARGUED FEBRUARY 13, 2001 — DECIDED SEPTEMBER 7, 2001

Before MANION, KANNE, and EVANS, *Circuit Judges.*

KANNE, *Circuit Judge.* Antonio Alanis, defendant-appellant, was convicted of conspiracy to distribute cocaine, two counts of possession with intent to distribute cocaine, one count of possession with intent to distribute marijuana, and two counts of being a felon in possession. He was sentenced to a term of imprisonment of 468 months, to be

followed by five years of supervised release. Alanis appeals his conviction, alleging that a myriad of errors were committed by the district court judge and the prosecuting attorney. Because we find that Alanis was not prejudiced by the errors that were made, we affirm his conviction.

I. History

We review the district court's findings of fact for clear error. *See United States v. O'Brien*, 238 F.3d 822, 825 (7th Cir. 2001).[1] The numerous drug transactions with which Alanis was involved began, for the purposes of this appeal, in June 1998. Alanis offered Stephen Moore money to help him unload a shipment of marijuana. He also asked Moore to find a suitable location. Moore proposed the property of his friend, Raymond Selke, in Michigan City, Indiana, and Alanis agreed to this location. Alanis, Moore, and Selke subsequently unloaded approximately 180 pounds of marijuana from the refrigerated semitrailer that was delivered to Selke's residence. Alanis paid Selke and Moore $9000 for their work.

Marijuana apparently was not lucrative enough because the three men entered into an agreement to deal in cocaine.

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1. Because the district court noted that "persons in the drug trade . . . often tend . . . to overestimate the quantities they actually handled," the court "discount[ed] the eyewitnesses' recollection of drug quantities by ten percent." *United States v. Alanis*, No. 3:00CR0008RM, slip op. at 2-3 (N.D. Ill. Aug. 4, 2000) (sentencing memorandum). For the purposes of this opinion, we use the drug amounts as determined by the district court at sentencing rather than those asserted by the government.

Appendix A

Alanis directed Selke to buy an International semi-tractor and provided him with the money to do so. At Alanis's behest, Selke had his driver, Raymond Henckel, drive the newly-purchased truck from Indiana to Texas in the spring of 1999. Selke, Moore, and Alanis flew to Texas on July 5, 1999; the reservation had been made that morning by a woman named Sarah (the name of Alanis's wife). A few days later, the truck was delivered to Alanis in Texas, and Selke and Moore drove it back to Indiana. Alanis returned home via commercial airline. Upon arrival in Indiana, Selke, Moore, and Alanis unloaded the 135 kilogram-sized packages of cocaine that had been hidden in a false fuel tank in the tractor. Alanis paid Selke and Moore $30,000 for their efforts.

The evidence at trial demonstrated that seven separate cocaine loads were transported from Texas to Indiana. In addition to the first load in July 1999, Selke and Moore drove three loads to Indiana (one load with 720 packages of cocaine in August 1999, one load with 540 packages in September, and one load with 540 packages in October), Henckel drove one load (with 540 packages in October), and Alanis arranged for two loads to be brought to Indiana by an independent driver (one with 405 packages at an unspecified date, the other with 422 packages in November). Moore and Selke helped Alanis unload the cocaine in each of these instances. Testimony at trial indicated that Alanis paid Selke and Moore $90,000 for their work on the August 1999 load alone. In all, the seven loads involved 3,302 one-kilogram packages of cocaine.

It was the November 1999 load that brought the conspiracy to an end. When the independent driver arrived

on November 4, Alanis, Moore, and Selke met at Selke's home to unload the semi. They moved the 422 packages of cocaine into a Chevy pickup truck that Alanis had brought to the premises. Unfortunately for the conspirators, agents had been performing surveillance at both Alanis's and Selke's residences. When Selke and Alanis left in the unloaded semi, they were stopped by police. Agents ordered the two occupants out of the truck and found a fake bill of lading indicating that the now empty semi had been carrying cargo from "Alro Steel" in South Bend. From that point forward, Selke agreed to cooperate with the authorities. He consented to a search of his property, and the agents seized the 422 packages of cocaine as well as the pickup truck. Lab oratory analysis confirmed that the 422 kilograms of seized substances were cocaine.

After Selke agreed to cooperate, Moore also agreed to cooperate. Both testified at Alanis's trial, and a substantial amount of the evidence at trial was derived from their testimony. As the district court noted, "[t]heir testimony was well corroborated by travel records, telephone records, and the testimony of each other." *United States v. Alanis*, No. 3:00CR0008RM, slip op. at 2 (N.D. Ill. Aug. 4, 2000) (sentencing memorandum). Both of the semi-tractors used to transport the drugs to Indiana were examined by agents, and the compartments in which the cocaine had been hidden were photographed and measured. Airline records placed Alanis in Texas at times consistent with the witness testimony; reflected that someone named Sarah made flight reservations for Alanis, Moore, and Selke when they traveled in July and August; reflected that someone named Sarah made flight reservations for Moore and Selke when they traveled

in September; and corroborated the times that Henckel had been in Texas. Telephone records corroborated the extensive phone contact between Alanis, Selke, and Moore — 178 calls from January 9, 1999 to November 4, 1999 — and also demonstrated that all telephone contact terminated on November 4, 1999, the date the agents made the seizure at Selke's residence.

Law enforcement agents arrested Alanis at his home on January 27, 2000, and searched his home pursuant to a warrant. They found a 9mm pistol in a bedside nightstand in the master bedroom. Next to the pistol were a pair of eyeglasses similar in appearance to those worn by Alanis at trial, and men's clothing and Alanis's wallet were found nearby. Agents also found a .22 caliber Marlin rifle in a cabinet in the basement of Alanis's home. There was evidence that both weapons had crossed state lines before they arrived in Indiana.

The original indictment, which charged only two counts, was superceded by a seven-count indictment returned on March 9, 2000. Alanis pleaded not guilty and proceeded to trial. On April 3, 2000, a jury found Alanis guilty of conspiracy to distribute cocaine in violation of 21 U.S.C. § 846 (Count I), one count of possession with intent to distribute marijuana in violation of 21 U.S.C. § 841(a)(1) (Count II), two counts of possession with intent to distribute cocaine in violation of 21 U.S.C. § 841(a)(1) (Counts IV and V), and two counts of possessing a firearm after a felony conviction in violation of 18 U.S.C. § 922(g) (Counts VI and VII of the indictment). The judge sentenced Alanis to 468 months on each of counts I, IV, and V; a term of

240 months on count II; and a term of 120 months on each of counts VI, and VII; all to be served concurrently. After entry of Judgment on August 4, 2000, Alanis filed his notice of appeal.

II. Analysis

Alanis makes a number of claims on appeal. He asserts that his rights were violated in contravention of the Sixth Amendment, the Equal Protection Clause, the Due Process Clause, the Fifth Amendment, and the rule set forth by the Supreme Court in *Apprendi v. New Jersey*, 530 U.S. 466, 120 S. Ct. 2348, 147 L. Ed. 2d 435 (2000). He also challenges the sufficiency of the evidence relied on to convict him and requests a new trial. We will address each of these arguments in turn.

A. Sixth Amendment Claim

Alanis alleges that he was deprived of his Sixth Amendment right to a jury pool representing a fair cross-section of the community because the venire included only one black person and no Hispanics. Alanis presents a mixed question of law and fact which we review *de novo*, *United States v. Raszkiewicz*, 169 F.3d 459, 462 (7th Cir. 1999), though the district court's factual determinations are reviewed for clear error, *United States v. Smallwood*, 188 F.3d 905, 914 (7th Cir. 1999), *cert. denied*, 528 U.S. 1129, 120 S. Ct. 964, 145 L. Ed. 2d 836 (2000). To establish a violation of the fair cross section requirement, Alanis must show:

> (1) that the group alleged to be excluded is a 'distinctive' group in the community; (2) that the representation of this group in venires from which juries are selected is not fair and reasonable in relation to the number of such persons in the community; and (3) that this under representation is due to systematic exclusion of this group in the jury-selection process.

Johnson v. McCaughtry, 92 F.3d 585, 590 (7th Cir. 1996) (citing *Duren v. Missouri*, 439 U.S. 357, 364, 99 S. Ct. 664, 58 L. Ed. 2d 579 (1979)). The district court found that, even if Blacks and Hispanics could be combined as one group, Alanis failed to demonstrate the existence of the second and third elements.

We agree that Alanis did not satisfy the *Duren* standard. In the South Bend Division of the Northern District of Indiana, jury venires are drawn from eleven counties, yet Alanis only presented statistical evidence about the racial composition of St. Joseph County, the county in which the district court was located. Without evidence about the total representation of Blacks and Hispanics in the community from which the venire was drawn, there is no way to determine whether the representation in the venire was not fair and reasonable. Without proof that any "distinctive group" is under-represented, we cannot determine that such a group was excluded from the jury-selection process. We thus decline to find that Alanis was deprived of his Sixth Amendment right to a jury pool representing a fair cross-section of the community.

Appendix A

B. Equal Protection Claims

1. Allegation of Purposeful Racial Discrimination

Alanis alleges that the government violated his right to equal protection of the law when it used a peremptory challenge to strike the only black member of the jury venire. At the time of the strike, defense counsel objected based upon *Batson v. Kentucky*, 476 U.S. 79, 106 S. Ct. 1712, 90 L. Ed. 2d 69 (1986). Under *Batson*, a court must follow a three stage analysis to determine whether a peremptory strike was discriminatory: (1) the defendant must make a prima facie showing of discrimination, (2) the prosecution must then present a race-neutral explanation for striking the juror, and (3) "the trial court must decide whether the prosecution's reasons are pretextual and whether the defendant has proven purposeful discrimination." *United States v. Jordan*, 223 F.3d 676, 686 (7th Cir. 2000).

Here, when the district court asked the prosecution to explain his reasons for the strike, the prosecutor explained as follows:

> I'm striking Mr. Cutler because of his lack of education [and] the fact that he's unemployed. In particular, . . . he said that he was trying to get a high school diploma. His form indicated that he only had 3 years of education, and I think he was talking about grade school. If he has 3 years of high school, we don't know. The reason is because lack of education.

Tr. of Trial Proceedings at I-143. The district court determined that these were legitimate, non-discriminatory reasons for striking a potential juror and overruled the *Batson* challenge. When reviewing a district court's determination that a peremptory challenge was not motivated by racial discrimination, we will uphold that determination unless it was clearly erroneous. *United States v. Jones*, 224 F.3d 621, 624 (7th Cir. 2000).

Peremptory strikes may be made for a variety of reasons, so long as they are not race based, *United States v. Smallwood*, 188 F.3d 905, 915 (7th Cir. 1999), and lack of education is an acknowledged, non-discriminatory reason for striking a juror, *see United States v. Marin*, 7 F.3d 679, 686-87 (7th Cir. 1993) ("The attainment of a certain educational level has been accepted by numerous circuits as a race neutral criterion for exercising a peremptory challenge under the *Batson* mandate, and, as far as we can determine, has been rejected by none."). Alanis has not presented the court with evidence that the prosecution's reasons were pretextual. *See Jones*, 224 F.3d at 624 (noting that the opponent of the strike bears the burden of proving racial discrimination) (citing *Purkett v. Elem*, 514 U.S. 765, 768, 115 S. Ct. 1769, 131 L. Ed. 2d 834 (1995)). We thus find that the district court's ruling, determining that the prosecution's reasons were nondiscriminatory, was not clearly erroneous.

2. Allegation of Selective Prosecution

At time of trial, Alanis's coconspirators — Moore and Selke — had not been prosecuted, and Alanis asserts that the reason he was prosecuted and they were not is that he is Hispanic. Alanis moved to dismiss based on selective

prosecution and the district court denied the motion. We review a district court's decision to deny a motion to dismiss an indictment for an abuse of discretion. *See United States v. McMutuary*, 217 F.3d 477, 481 (7th Cir. 2000), *cert. denied*, __ U.S. __ 121 S. Ct. 502, 148 L. Ed. 2d 471 (2000).

Criminal defendants bringing selective prosecution claims must show "that the federal prosecutorial policy had a discriminatory effect and that it was motivated by a discriminatory purpose." *United States v. Hayes*, 236 F.3d 891, 895 (7th Cir. 2001) (quotation omitted). To establish discriminatory effect, the defendant must show "that similarly situated individuals of a different race were not prosecuted." *Id.*; *see also Chavez v. Ill. State Police*, 251 F.3d 612, 638 (7th Cir. 2001). Alanis intimates that no factor other than race distinguished him from those who were not being prosecuted. In the court below, the prosecutor first explained that Selke and Moore probably would be prosecuted at some future date. He then asserted that Alanis was not similarly situated to Selke or Moore for two main reasons: 1) the government believed that Alanis played a larger role in the conspiracy because he had initiated the drug trafficking and also directed the activities of Selke and Moore, and 2) Selke and Moore were cooperating with the government (and eventually testified at Alanis's trial). The court agreed that the fact that Selke and Moore were cooperating with the government distinguished them from Alanis and thus denied the motion to dismiss. Tr. of Trial Proceedings at I-61 (citing *Jarrett v. United States*, 822 F.2d 1438, 1444 (7th Cir. 1987) (finding that the defendant was not similarly situated to his accomplices because they both agreed to cooperate with the government whereas he refused to do so)).

While a criminal defendant is certainly not required to cooperate with the government, it is axiomatic that an individual who decides not to cooperate with the government is not similarly situated to one who does cooperate. *See Jarrett*, 822 F.2d at 1444. The district court noted that, if the "bigger picture showed that in all similar cases the non-Mexican suspects were given an opportunity to cooperate to the exclusion of those of Mexican descent, obviously the issue might well be different." Tr. of Trial Proceedings at I-61, 62. Yet, as the district court noted, such was not the case here. Instead, one conspirator decided not to cooperate while the others did. We thus find that the district court did not abuse its discretion in denying the motion to dismiss on the basis of selective prosecution.

C. Due Process Claims

1. Brady Claim

Alanis asserts that the government violated its obligation under *Brady v. Maryland*, 373 U.S. 83, 83 S. Ct. 1194, 10 L. Ed. 2d 215 (1963), by suppressing evidence material to the defense, namely, the government's immunity agreements with the testifying co-conspirators. Alanis alleges that the co-conspirators "had some sort of immunity" and that the disclosure of such information would have allowed the defense to impeach the motivation and credibility of the government witnesses. In response, the government asserts that there were no immunity agreements to disclose, and thus no *Brady* obligations were violated. Further, the government points out that the defense knew the co-conspirators were not being prosecuted and that the defense used this

information at trial to attack the credibility of these witnesses. The district court found that the disputed evidence was not material under *Brady*, a ruling that we review for abuse of discretion. *See United States v. Cruz-Velasco*, 224 F.3d 654, 662 (7th Cir. 2000).

At trial, a prosecution witness acknowledged that agents had initially planned not to charge Selke, and Alanis asserts that this information should have been disclosed to the defense at the outset. While both Selke and Moore were likely hopeful that they would not be prosecuted, neither of them were given immunity in exchange for their testimony at trial and the government had not agreed not to prosecute them. The only guarantee Selke and Moore had was a Rule 11 promise that the information each of them provided would not be used against them (though anything Selke said could be used against Moore and vice versa) and the defense was aware of the letters. The defense was also aware that the coconspirators were not being prosecuted at the time of Alanis's trial and, as noted above, it used this information to question the witnesses' credibility. Alanis has failed to demonstrate that "the prosecution suppressed evidence . . . favorable to the defense . . . that . . . was . . . material to an issue at trial." *United States v. Payne*, 102 F.3d 289, 293 (7th Cir. 1996). We thus find that the district court did not abuse its discretion in rejecting Alanis's *Brady* claim.

2. Prosecutorial Misconduct Claims

Alanis alleges that the prosecutor improperly vouched for the credibility of various witnesses and gave personal opinions of things not in evidence. The first claim is presented

in four sentences with one pertinent citation. The other claim is slightly more thorough but lacks citation to anything of precedential value. Both claims are so weakly developed and devoid of merit that we decline to address them. *See Jones*, 224 F.3d at 626 ("Arguments that are not adequately developed or supported are waived, ergo we do not consider [them].") (citation omitted).

D. Fifth Amendment Claim

Alanis asserts that the prosecution improperly commented on his failure to testify, in violation of his Fifth Amendment right to remain silent. He presents a series of statements made in the prosecutor's closing argument which, he asserts, insinuated that his silence was probative of guilt. "[I]ndirect commentary on a defendant's failure to take the stand can . . . constitute a violation of the defendant's Fifth Amendment privilege not to testify." *United States v. Aldaco*, 201 F.3d 979, 987 (7th Cir. 2000). Moreover:

> a prosecutor's comment that the government's evidence on an issue is uncontradicted, undenied, unrebutted, undisputed, etc., will be a violation of the defendant's Fifth Amendment rights if: 1) the only person who could have contradicted, denied, rebutted, or disputed the evidence was the defendant; 2) the prosecutor manifestly intended to refer to a defendant's silence; or 3) a jury would naturally and necessarily take the remark for a comment on the defendant's silence.

Id. (internal quotations omitted). The defendant did not object at trial to any of the comments he now criticizes, thus we

review the prosecutor's comments for plain error. *See United States v. Laurenzana*, 113 F.3d 689, 695 (7th Cir. 1997) (citing *United States v. Olano*, 507 U.S. 725, 732, 113 S. Ct. 1770, 123 L. Ed. 2d 508 (1993)).

During closing argument, the prosecutor asked the jury, "Why would [Alanis and the co-conspirators] stop calling each other if there wasn't a conspiracy like this?" He asked if the defense had talked to the jury about the numerous trips to Texas and then stated that the defense case was "long on rhetoric, short on content." He also asked whether the jury had heard any explanation from the defense about the bill of lading that agents found in the semi-tractor on November 4, 1999, which indicated that cargo had been picked up at "Alro Steel" in South Bend.

In sum, the prosecutor's comments were directed towards reinforcing that the government's case was undisputed in material respects. The prosecution may "ask[ ] the jury to assess the value of the existing evidence in light of the countermeasures that were (or were not) taken." *United States v. Sblendorio*, 830 F.2d 1382, 1391 (7th Cir. 1987). While the prosecutor's comments would have been improper if Alanis was the only person who could have contradicted, denied, rebutted, or disputed the evidence, *see Aldaco*, 201 F.3d at 987, such was not the case here. The defense could have produced evidence to explain why the phone calls ceased without Alanis having to testify; for example, phone company records showing that his phone was disconnected or a friend's testimony that Alanis, Selke, and Moore had a falling out. Similarly, with the trips to Texas the defense could have presented proof that Alanis was attending a conference for

work or visiting relatives with his family. As for the bill of lading, a witness from the steel company named on the bill could have testified that the bill was genuine. Further, none of these comments were "manifestly intended to refer to a defendant's silence" and would not have been likely taken "for a comment on the defendant's silence." *Id.* Plain error review requires us to determine whether the prosecutor's remarks "deprived the defendant of a fair trial" and whether the failure to correct any error would result in "a miscarriage of justice." *Laurenzana*, 113 F.3d at 695. We do not believe that the prosecutor's comments were plainly erroneous and find that they did not improperly burden Alanis's Fifth Amendment privilege not to testify.

E. Apprendi Claims

Alanis alleges that both the grand jury indictment and the instructions given to his petit jury were defective in light of the rule announced in *Apprendi v. New Jersey*, 530 U.S. 466, 120 S. Ct. 2348, 147 L. Ed. 2d 435 (2000), and that his resulting sentence was without proper foundation. He did not present these challenges to the district court; therefore, we review the indictment to determine whether "it is so defective that it does not, by any reasonable construction, charge an offense for which the defendant is convicted," *United States v. Irorere*, 228 F.3d 816, 830 (7th Cir. 2000) (internal quotation omitted), and we review the jury instructions for plain error, *see United States v. Jones*, 245 F.3d 645, 648 (7th Cir. 2001).

We have recently addressed the law applicable to Alanis's situation:

> In *Apprendi*, the Supreme Court held that "any fact other than the fact of a prior conviction that increases the penalty for an offense beyond the statutory maximum penalty for that offense is an element of the crime and so must be submitted to the jury and proved beyond a reasonable doubt." *United States v. Jackson*, 236 F.3d 886, 887 (7th Cir. 2001) (citing *Apprendi*, 120 S. Ct. at 2362-63). In cases involving drugs and alleged violations of 21 U.S.C. §§ 841 and 846, like the one now before us, we have held that "before a defendant can be sentenced to a term of imprisonment above the default statutory maximum provided in § 841(b)(1)(C) or (D), *Apprendi* requires that a drug type and amount sufficient to trigger the higher statutory maximums of § 841(b)(1)(A) or (B) be charged in the indictment and found by the jury." *United States v. Mietus*, 237 F.3d 866, 874 (7th Cir. 2001). When a drug amount is not charged in an indictment or included in instructions submitted to a jury, the statutory maximum under § 841(b) is to be determined without making any reference to drug amount. *See United States v. Westmoreland*, 240 F.3d 618, 632 (7th Cir. 2001).

Jones, 245 F.3d at 648. With this legal framework in mind, we review the various counts of which Alanis was convicted.

Appendix A

1. The Conspiracy Count: Count I

Count I of the indictment charged Alanis with conspiring "to distribute and to possess with the intent to distribute . . . cocaine . . . in an amount in excess of five (5) kilograms" in violation of 21 U.S.C. §§ 841(a)(1)[2] and 846.[3] The drug amount was thus charged in the indictment as required by *Apprendi*. The jury instructions did not, however, make any reference to the amount of cocaine involved in the conspiracy. Rather, the instructions stated that the jury had to find "that the conspiracy as charged in Count I" was proved beyond a reasonable doubt. Whether drug quantity is "submitted to a jury" when the jury instructions do not mention drug quantity but instead incorporate an indictment in which drug quantity was charged is an issue our court has yet to consider. Even if we might find this type of reference enough to satisfy *Apprendi* in certain instances, however, we are not confident that the jury even read the indictment, much less found beyond a reasonable doubt that Alanis possessed the drug quantity charged here. First of all, the indictment was not read to the jury; the jurors were simply given a copy along with the trial exhibits and jury instructions. Further, the jury

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2. Section 841(a) states that "it shall be unlawful for any person knowingly or intentionally — 1) to manufacture, distribute, or dispense, or possess with intent to manufacture, distribute, or dispense, a controlled substance." 21 U.S.C. § 841(a).

3. Section 846 states: "Any person who attempts or conspires to commit any offense defined in this subchapter shall be subject to the same penalties as those prescribed for the offense, the commission of which was the object of the attempt or conspiracy." 21 U.S.C. § 846.

instructions replicated the description of the charge, thus precluding any need to read the indictment in order to find out what had been charged in Count I:

> Count I of the indictment charges Mr. Alanis with conspiracy to distribute, and possess with intent to distribute, a controlled substance. The indictment alleges that, in or around June 1999 and continuing to and including November 4, 1999, Mr. Alanis and others conspired to knowingly and intentionally distribute, and possess with intent to distribute, cocaine.

Neither was the quantity included on the jury verdict. It is possible, then, that the jury found Alanis guilty of conspiring to distribute and possess cocaine without ever determining the quantity involved in the conspiracy.

The judge sentenced Alanis to 468 months on Count I in accord with 21 U.S.C. § 841(b)(1)(A) — this is above the default statutory maximum of twenty years provided in 21 U.S.C. § 841(b)(1)(C) and is also above the thirty-year maximum for a defendant previously convicted of a felony drug offense. *See* 21 U.S.C. § 841;[4] *see also Jones*, 245 F.3d

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4. 21 U.S.C. § 841 provides:

> (b) . . . [A]ny person who violates subsection (a) of this section shall be sentenced as follows:
>
> (1)(A) In the case of a violation of subsection (a) of this section involving — . . .

(Cont'd)

at 650-51. Because Alanis was "sentenced to a term of imprisonment above the default statutory maximum" without a jury determination of the amount of drugs involved, he was sentenced in violation of the rule set forth in *Apprendi*. *See Jones*, 245 F.3d at 648 (internal quotation and citation omitted).

Our review is for plain error review. In order to prevail, Alanis must show not only that there was plain error, but also that the error "affected [his] substantial rights" and "seriously affected the fairness, integrity, or public reputation

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(Cont'd)

> (ii) 5 kilograms or more of a mixture or substance containing a detectable amount of — . . .
>
> (II) cocaine, its salts, optical and geometric isomers, and salts of isomers; . . .
>
> such person shall be sentenced to a term of imprisonment which may not be less than 10 years or more than life . . . .
>
> (C) In the case of a controlled substance in schedule I or II [which includes cocaine], such person shall be sentenced to a term of imprisonment of not more than 20 years . . . . If any person commits such a violation after a prior conviction for a felony drug offense has become final, such person shall be sentenced to a term of imprisonment of not more than 30 years . . . .

of the judicial proceedings." *United States v. Nance*, 236 F.3d 820, 824 (7th Cir. 2000), *petition for cert. filed*, No. 00-9633 (Apr. 24, 2001). When there was "overwhelming" evidence that the defendant's offense involved an amount sufficient to trigger the higher statutory maximums, "he is not entitled to be re-sentenced on the basis of *Apprendi*." *Jackson*, 236 F.3d at 888 (quotation omitted). Here, there was overwhelming evidence that more than five kilograms were involved in the conspiracy. Even if the only load considered was the load seized by agents on November 4, 1999, that load contained 422 kilograms of cocaine. We have found that an *Apprendi* error does not seriously affect the fairness, integrity, or public reputation of the judicial proceedings where the record provides overwhelming support for the conclusion that more than five kilograms were involved, *see Nance*, 236 F.3d at 826, and this situation clearly falls into that category, *see id.* ("If it is clear beyond a reasonable doubt that a properly worded indictment and a properly instructed jury would have found [the defendant] guilty absent this error, then we cannot say that the error was so serious that it requires us to set aside the judgment."); *see also Jackson*, 236 F.3d at 888 ("No reasonable jury could have failed to convict Jackson of being involved in the sale of hundreds, if not thousands, of grams of crack. The failure to ask the jury to determine whether the amount was at least 5 grams was harmless far beyond a reasonable doubt."). We thus find that Alanis is not entitled to be re-sentenced on Count I.

Appendix A

2. The Cocaine Counts: Counts IV and V

Counts IV and V both charged that Alanis "possess[ed] with intent to distribute cocaine . . . in excess of five (5) kilograms," and the latter count noted that the amount was "approximately 422 kilograms."[5] Although both counts of the indictment charged a specific amount of drugs, the jury instructions did not do so. And as with Count I, Alanis's sentence was above the default statutory maximum — 468 months on each of Counts IV and V. We thus reach the same conclusion as we did with respect to Count I — *Apprendi* was violated because the drug quantity charged in Counts IV and V was not submitted to the jury and proved beyond a reasonable doubt.

We again find, however, that this error does not require that Alanis be resentenced. Count V, which pertained to the November 4 seizure, clearly involved more than 5 kilograms. With respect to Count IV, the witnesses testified that there was at least 150 kilograms and as much as 300 kilograms of cocaine (the district court discounted this testimony and determined that Alanis was responsible for 135 kilograms). The defense never asserted that the witnesses were exaggerating the amounts and it made no attempt to show that Alanis possessed a quantity less than five kilograms. Instead, the defense strategy at trial was to argue that Alanis was innocent of all charges. The jury obviously disagreed.

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5. Count IV charged that, in or around July 1999, Alanis "possess [ed] with intent to distribute cocaine . . . in excess of five (5) kilograms." Count V charged that on November 4, 1999 he "possess[ed] with intent to distribute cocaine . . . in excess of five (5) kilograms (approximately 422 kilograms)."

Based upon this record, there is no doubt that a properly instructed jury would have found Alanis guilty of possessing more than five kilograms of cocaine on both occasions charged in Counts IV and V. *See Nance*, 236 F.3d at 826.

3. The Marijuana Count: Count II

With respect to the marijuana count, Count II, the indictment did not charge a specific amount of marijuana, it simply alleged that Alanis "possess [ed] with intent to distribute marijuana." This is clearly a violation of *Apprendi*. *See Jones*, 245 F.3d at 648. Yet, even if we remanded for re-sentencing, obtaining a reduced sentence on Count II would not reduce Alanis's time in prison. The judge sentenced Alanis to 468 months on each of Counts I, IV, and V and a term of 240 months on Count II, all to be served concurrently. Because the sentence for Count II runs concurrently to the sentence for Counts I, IV, and V — which we have already determined to be proper — the error had no effect on Alanis's sentence and thus did not prejudice him. *See Nance*, 236 F.3d at 824.

Nor did the marijuana count have any effect on the court's determination of his offense level under the United States Sentencing Guidelines.[6] The court grouped all of Alanis's drug counts together for sentencing, used the drug equivalency table to convert the relevant amount of cocaine

6. At sentencing, the judge calculated Alanis's offense level at 38 (due to his prior felony conviction); increased his offense level by two levels pursuant to section 3B1.1 of the United States Sentencing Guidelines, based on Alanis's role in organizing the offense; and determined that he fell into criminal history category III.

to marijuana (the table equates 1 gram of powder cocaine to 200 grams of marijuana), and then added the amount of marijuana charged in Count II,[7] yielding a grand total of 660,481.648 kilograms of marijuana. Under the relevant sentencing guideline, an offense that involves more than 30,000 kilograms of marijuana is assigned an offense level of 38. Thus, even if the 81.648 kilograms of marijuana were removed from the total drug amount, Alanis would not have fallen into a lower offense level. Alanis's substantial rights were clearly not affected by the district court's error.

F. Insufficiency of the Evidence Claims

Alanis's final assertion is that the evidence presented at trial was not sufficient to sustain the verdict beyond a reasonable doubt. He raised this challenge before the district court by orally moving for a new trial (which the judge construed as a Rule 33 motion for new trial, as provided in the Federal Rules of Criminal Procedure) but the judge denied the motion. *See United States v. Alanis*, No. 3:00CR0008RM, slip op. (N.D. Ill. April 6, 2000).[8] We limit our discussion of

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7. The relevant quantity of marijuana was estimated based upon the witness testimony at trial. Moore and Selke had testified that the marijuana possessed by Alanis filled the bed of a pickup truck two-thirds of the way. Moore estimated that there were at least 90 packages in the truck bed and that each package weighed a couple of pounds (Selke thought there were over 100 packages). The judge thus determined that there were 90 packages of two pounds, resulting in 180 pounds of marijuana (an amount equal to 81.648 kilograms).

8. Alanis's brief argues that he should have been granted a new trial, and states that his oral motion for a new trial was accepted as a (Cont'd)

this issue to that which is challenged in Alanis's brief: his conviction on Counts VI and VII for being a felon in possession of firearms that traveled in interstate commerce, in violation of 18 U.S.C. § 922(g).[9] The jury found Alanis guilty of possession of a Smith and Wesson 9mm pistol and a Marlin .22 caliber rifle on or about January 27, 2000. He argues that the government did not prove that he was in possession or control of either weapon, pointing out that the pistol belonged to his wife and that the rifle was found inoperable in the basement, and had been left there by the previous owner of the house. Alanis does not challenge that

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(Cont'd)
Rule 33 motion. Indeed, the trial transcript reveals that, once counsel began to argue that the evidence was insufficient, the court asked whether counsel wanted "to file a motion under Rule 33 for a new trial." Tr. of Trial Proceedings at V186. The judge's memorandum and order did not treat the motion as a Rule 33 motion, however; it referred to it as an oral motion for judgment of acquittal pursuant to Rule 29(c). *See Alanis*, slip op. at 1. Because neither Alanis nor the government mentioned this issue on appeal, we address Alanis's claim as presented in his appellate brief (and we acknowledge that the standard for granting a new trial under Rule 33 is less strenuous than the standard for granting a motion for judgment of acquittal under Rule 29(c)).

9. 18 U.S.C. § 922(g) states, in relevant part:

> It shall be unlawful for any person — (1) who has been convicted in any court of, a crime punishable by imprisonment for a term exceeding one year; . . . to ship or transport in interstate or foreign commerce, or possess in or affecting commerce, any firearm or ammunition; or to receive any firearm or ammunition which has been shipped or transported in interstate or foreign commerce.

he lived in the house where the guns were found but rather claims that he was unaware that the guns were present in the house, and thus he could not be guilty of knowing possession.[10]

"When considering a motion for a new trial based on the sufficiency of the evidence, we grant such a request only if the verdict is against the manifest weight of the evidence. . . . A district court's denial of a motion for a new trial will be reversed only upon a showing that the court abused its discretion." *Tullis v. Townley Eng'g & Mfg. Co.*, 243 F.3d 1058, 1062 (7th Cir. 2001) (citations omitted). We consider the evidence in the light most favorable to the government, drawing all reasonable inferences in its favor. *See Alverio v. Sam's Warehouse Club, Inc.*, 253 F.3d 933, 939 (7th Cir. 2001); *see also United States v. Kosth*, 257 F.3d 712, 718 (7th Cir. 2001).

Under 18 U.S.C. § 922(g)(1), the government had to "establish beyond a reasonable doubt that (1) [Alanis] had a previous felony conviction, (2) [he] possessed a firearm, and

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10. It is not clear whether the government attempted to demonstrate that the pistol and rifle were acquired separately and at different times or places. If they did not make such a showing, the indictment under which Alanis was charged would be duplicitous under our recent holding in *United States v. Buchmeier*, 255 F.3d 415, 422 (7th Cir. 2001) (holding that, without such a showing, "the government may only charge [the] defendant with one violation of § 922(g)(1) . . . , regardless of the actual quantity of firearms involved"). The defense did not challenge the indictment on this ground, yet even if it had, because the 120-month sentence Alanis received on the weapons counts is to be served concurrently with the 468 months on each of Counts I, IV, and V, any error was harmless. *See id.* at 426.

(3) the firearm had traveled in or affected interstate commerce." *United States v. Walls*, 225 F.3d 858, 864 (7th Cir. 2000). Alanis only challenges the second element, asserting that he did not possess a firearm within the meaning of the statute. It is well established that possession may be either actual or constructive. *See United States v. Kitchen*, 57 F.3d 516, 520 (7th Cir. 1995). The government does not contend that Alanis had actual possession, seemingly because there was no evidence that Alanis "ever had physical control over the gun." *Walls*, 225 F.3d at 866. In the absence of "direct physical contact . . . , a defendant may nevertheless have constructive possession if she knowingly has the power and the intention at a given time to exercise dominion and control over an object, either directly or through others." *Id.* (internal quotation and citations omitted). We have repeatedly held that "constructive possession may be established by a showing that the firearm was seized at the defendant's residence." *Id.* at 867 (citing *Kitchen*, 57 F.3d at 521); *see also United States v. Hopson*, 184 F.3d 634, 636 (7th Cir. 1999) (noting that the police found the guns among the defendant's things in the defendant's home), *cert. denied*, 528 U.S. 1093, 120 S. Ct. 828, 145 L. Ed. 2d 696 (2000); *United States v. Taylor*, 154 F.3d 675, 682 (7th Cir. 1998) (finding constructive possession where there was substantial evidence that the defendant lived at the residence where the weapons were seized, that he was the only man at the residence, and that "[t]he weapons were found in a padlocked closet near [his] bed . . . [that contained] only men's clothing[,] cologne, [and] a receipt with his name on it"). When a gun is found in a defendant's bedroom, as here, it would not be improper for the jury to "infer that [the defendant] had both knowledge of the firearm and an intent

to exercise dominion and control over it merely from its presence in the bedroom that [he] . . . shared with [his wife]." *Walls*, 225 F.3d at 867.

Alanis asserts that the pistol was his wife's and that it was found in her bedroom. However, it is not material that Alanis's wife might have owned the pistol because "[c]onstructive possession may be either sole or joint." *Kitchen*, 57 F.3d at 521. Thus, her ownership does not preclude Alanis's possession. Further, the government presented sufficient evidence to support a finding that the bedroom was shared by Alanis and his wife, and that the gun was found in a nightstand next to his bed, with his eyeglasses, clothing, and wallet nearby.

Alanis also asserts that, because the rifle was inoperable and found in the basement, the government failed to demonstrate possession. We have previously rejected the contention that the government must "prove that the gun was operable," *United States v. Buggs*, 904 F.2d 1070, 1075 (7th Cir. 1990), because it is sufficient to show that "the gun was designed to fire," *id.* (quotation and citation omitted). There is no disputing that the item seized was indeed a rifle that was designed to fire. In sum, we cannot find that the evidence was so insufficient as to justify overruling the district court's decision not to grant a new trial.

Appendix A

III. Conclusion

For the foregoing reasons, we AFFIRM the conviction and sentence of Antonio Alanis.

A true Copy:

Teste:

Clerk of the United States Court of Appeals for the Seventh Circuit

APPENDIX B — JUDGMENT OF THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF INDIANA DATED AUGUST 4, 2000

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF INDIANA

Cause No. 3:00CR00008(01)RM

UNITED STATES OF AMERICA

v.

ANTONIO ALANIS
(Name of Defendant)

JUDGMENT IN A CRIMINAL CASE
(For Offenses Committed On or After November 1, 1987)

Lonnie M. Randolph, Sr.
Defendant's Attorney

THE DEFENDANT:

XX was found guilty on count(s) *1s, 2s, 4s, 5s, 6s and 7s of the superseding indictment* after a plea of not guilty.

Accordingly, the defendant is adjudged guilty of such count(s), which involve the following offenses:

Appendix B

Title & Section	Nature of Offense	Date Offense Concluded	Count No(s).
21:846 & 18:2	Conspiracy to Distribute Cocaine, Aiding and Abetting Therein.	June 1999	1s
21:841(a)(1) & 18:2	Possession with Intent To Distribute Marijuana, Aiding and Abetting Therein.	July 1998	2s
21:841(a)(1) & 18:2	Possession with Intent To Distribute Cocaine, Aiding and Abetting Therein.	July 1999	4s
21:841(a)(1) & 18:2	Possession with Intent To Distribute Cocaine, Aiding and Abetting Therein.	11-04-99	5s
18:922(g) & 18:924(a)(2)	Felon in Possession of A Firearm.	01-27-00	6s
18:922(g) & 18:924(a)(2)	Felon in Possession of A Firearm.	01-27-00	7s

Defendant is sentenced as provided on additional pages of this Judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

Appendix B

XX Count(s) 1 and 2 of the original are dismissed on motion of the United States and Count 3s of the superseding indictment was dismissed on 3-23-00 on government motion.

XX It is ordered that defendant shall pay to the United States a special assessment of $*600.00*, for Count(s) *1s, 2s, 4s, 5s, 6s and 7s* which shall be due **immediately** as follows: payable to Clerk, U.S. District Court, 102 Federal Bldg., 204 S. Main St., South Bend, Indiana 46601. It is further ordered that the defendant shall notify the Clerk, of the United States District Court for this district within 30 days of any change of name, residence or mailing address until all fines, restitution, costs, and special assessments imposed by this Judgment are fully paid.

Defendant's Soc. Sec. No.:
558-96-7816

August 4, 2000
Date of Imposition of Sentence

Defendant's Date of Birth:
10-29-55

s/ Robert L. Miller, Jr.
Robert L. Miller, Jr., Judge
United States District Court

Defendant's Mailing Address:
#06193-027,
St. Joseph County Jail
129 S. Main Street
South Bend, Indiana 46601

August 4, 2000
Date

Defendant's Residence Address:
2550 Warren Street
Lake Station, Indiana 46405

Appendix B

IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a term of four hundred sixty-eight (468) on each of counts 1s, 4s and 5s, a term of two hundred forty (240) months on count 2s and a term of one hundred twenty (120) months on each of counts 6s and 7s, with all to be served concurrently.

* * *

XX The defendant is remanded to the custody of the U.S. Marshal.

* * * *

Supreme Court, U.S.
FILED
APR 8 2002
OFFICE OF THE CLERK

No. 01-904

In the Supreme Court of the United States

ANTONIO ALANIS, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

THEODORE B. OLSON
Solicitor General
Counsel of Record
MICHAEL CHERTOFF
Assistant Attorney General
MICHAEL A. ROTKER
Attorney
Department of Justice
Washington, D.C. 20530-0001
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QUESTION PRESENTED

Whether the district court committed reversible error under *Apprendi* v. *New Jersey*, 530 U.S. 466 (2000), in sentencing petitioner to 468 months' imprisonment for drug trafficking offenses, when the quantity of drugs involved in those offenses was not proved to the jury beyond a reasonable doubt.

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In the Supreme Court of the United States

No. 01-904

ANTONIO ALANIS, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-28a) is reported at 265 F.3d 576.

JURISDICTION

The judgment of the court of appeals was entered on September 7, 2001. The petition for a writ of certiorari was filed on December 5, 2001. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Northern District of Indiana, petitioner

was convicted on one count of conspiracy to distribute cocaine, in violation of 21 U.S.C. 846 (Count 1); two counts of possession of cocaine with the intent to distribute it, in violation of 21 U.S.C. 841(a)(1) (Counts 4 and 5); one count of possession of marijuana with the intent to distribute it, in violation of 21 U.S.C. 841(a)(1) (Count 2); and two counts of being a felon in possession of a firearm, in violation of 18 U.S.C. 922(g) (Counts 6 and 7). He was sentenced to 468 months' imprisonment, to be followed by five years' supervised release. The court of appeals affirmed. Pet. App. 1a-28a.

1. In June 1998, petitioner offered Stephen Moore money to help him unload a shipment of marijuana, and Moore agreed. Petitioner asked Moore to find a location to store the marijuana, and Moore suggested the property of his friend Raymond Selke. Petitioner, Moore, and Selke unloaded a shipment of approximately 81 kilograms of marijuana on Selke's property. Pet. App. 2a; Gov't C.A. Br. 5-6.

Subsequently, petitioner, Moore, and Selke agreed to procure and distribute large quantities of cocaine. Petitioner instructed Selke to purchase a truck and gave him the money to do so. In the spring of 1999, Selke, at petitioner's behest, asked Raymond Henckel to drive the truck from Indiana to Texas. On July 5, 1999, petitioner, Moore, and Selke flew to Texas, where they picked up the truck, which had been stocked with cocaine in hidden compartments inside the fuel tanks. Selke and Moore drove the truck back to Indiana, while petitioner returned by air. Upon their arrival in Indiana, the three men unloaded approximately 300 kilogram-size packages of cocaine. Pet. App. 2a-3a; Gov't C.A. Br. 6-7.

Over the next few months, petitioner, Selke, and Moore transported six additional loads of cocaine from

Texas to Indiana. The loads ranged in size from 422 kilograms to 800 kilograms. Pet. App. 3a; Gov't C.A. Br. 7-9.

On November 4, 1999, after the three men had unloaded a 422-kilogram shipment of cocaine at Selke's property, law-enforcement officers, who had been watching the property, approached Selke and seized the cocaine. Selke, and later Moore, cooperated with the authorities. Pet. App. 3a-4a; Gov't C.A. Br. 3-5.

On January 27, 2000, petitioner was arrested. During a search of his residence, law-enforcement officers found a 9 millimeter semi-automatic handgun in a nightstand in the master bedroom and a .22 caliber rifle in a cabinet in the basement. See Pet. App. 5a; Gov't C.A. Br. 10.

2. Petitioner was charged in a seven-count superseding indictment with drug and firearms offenses. Count 1 charged petitioner with conspiring to possess "an amount in excess of five (5) kilograms" of cocaine with the intent to distribute it, in violation of 21 U.S.C. 846. Count 2 charged petitioner with possessing an unspecified quantity of marijuana with the intent to distribute it, in violation of 21 U.S.C. 841(a)(1). Counts 3 and 4 charged petitioner with possessing "in excess of five (5) kilograms" of cocaine with the intent to distribute it, in violation of 21 U.S.C. 841(a)(1). Count 5 charged petitioner with possessing "in excess of five (5) kilograms (approximately 422 kilograms)" of cocaine with the intent to distribute it, in violation of 21 U.S.C. 841(a)(1). Counts 6 and 7 charged that petitioner, a previously convicted felon, unlawfully possessed firearms, in violation of 18 U.S.C. 922(g). The district court dismissed Count 3 before trial.

At trial, petitioner's defense strategy focused on his claimed innocence of the crimes. Pet. App. 21a. Peti-

tioner did not request that the jury be instructed to find drug quantity beyond a reasonable doubt, and the district court did not give such an instruction. The jury found petitioner guilty of the six remaining counts. *Id.* at 29a.

3. The Probation Office prepared petitioner's Presentence Report (PSR). The PSR determined that petitioner's offenses involved between 3622 and 3922 kilograms of cocaine, an amount that included the seven Texas-to-Indiana cocaine shipments. PSR para. 29. Petitioner disputed the quantity of drugs attributed to him on the ground that "the amounts and dates come exclusively from the confidential informants or cooperating witnesses, Mr. Selke and Mr. Moore." Objections to PSR para. 16.

At sentencing, petitioner contended he was responsible for 432 kilograms of cocaine, rather than the larger quantities attributed to him in the PSR. See 8/4/00 Sentencing Tr. 9. The district court concluded that the government had proved "by more than a preponderance of the evidence" that petitioner was responsible for 3302 kilograms of cocaine. *Id.* at 23-27. The court converted that quantity to marijuana to account for the 81.648 kilograms of marijuana involved in Count 2. On that basis, the court determined that petitioner was responsible for 660,481.648 kilograms of marijuana, an amount that triggered a base offense level of 38 under the Sentencing Guidelines. *Id.* at 28. The court added a two-level increase in petitioner's offense level because he was a leader of the conspiracy. With a total offense level of 40 and a criminal history category of III, petitioner was subject to a Guidelines sentencing range of 360 months' to life imprisonment. *Id.* at 34. The court imposed concurrent sentences of 468 months' imprisonment on the cocaine counts, 240 months'

imprisonment on the marijuana count, and 120 months' imprisonment on the firearms counts. *Id.* at 80. The court also imposed a five-year term of supervised release. *Ibid.*

4. The court of appeals affirmed. Pet. App. 1a-28a.

The court of appeals rejected petitioner's contention that his sentences for the drug offenses should be reversed under *Apprendi* v. *New Jersey*, 530 U.S. 466 (2000), because those sentences were based on a fact, drug quantity, that was not alleged in the indictment or found by the jury beyond a reasonable doubt. The court of appeals held that, because petitioner had not raised any *Apprendi*-type claim in the district court, the claim was subject to review under the plain-error standard. Pet. App. 19a; see Fed. R. Crim. P. 52(b).

On the three cocaine counts, the court of appeals found no *Apprendi* error with respect to the indictment, which alleged that each of those counts involved "in excess of five (5) kilograms" of cocaine. The court held that the failure to submit the question of threshold drug quantity to the jury was error under *Apprendi*. The court concluded, however, that the error did not affect petitioner's "substantial rights," because the evidence of threshold drug quantity was overwhelming and essentially uncontroverted. Pet. App. 17a-22a.

On the marijuana count, the court of appeals found *Apprendi* error in the failure to allege drug quantity in the indictment and to submit the question of threshold drug quantity to the jury. Again, however, the court concluded that the error did not affect petitioner's substantial rights, because his 240-month sentence on the marijuana count was to run concurrently with his 468-month sentences on the cocaine counts. Pet. App. 22a.

ARGUMENT

Petitioner contends (Pet. 5-13) that his 468-month sentences on the cocaine-trafficking counts and his 240-month sentence on the marijuana-trafficking count should be vacated in light of *Apprendi* v. *New Jersey*, 530 U.S. 466 (2000), because those sentences exceed the otherwise-applicable statutory maximum based on a fact, drug quantity, that was not found by the jury beyond a reasonable doubt. Petitioner raised his *Apprendi* claim for the first time on appeal. The court of appeals, applying the plain-error standard, rejected the claim. That conclusion is correct and does not warrant this Court's review.

1. In *Apprendi*, this Court held that, "[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." 530 U.S. at 490. As the court of appeals recognized, the district court erred under *Apprendi* in sentencing petitioner to 468 months' imprisonment on the three cocaine counts and 240 months' imprisonment on the marijuana count, because those sentences depend upon a fact, drug quantity, that was not found by the jury beyond a reasonable doubt. In the absence of such a jury finding, petitioner was subject to statutory maximum sentences of 240 months' imprisonment on the cocaine counts, see 21 U.S.C. 841(b)(1)(C), and 60 months' imprisonment on the marijuana count, see 21 U.S.C. 841(b)(1)(D).

Because petitioner did not raise any *Apprendi*-type challenge to his sentence in the district court, however, the court of appeals correctly reviewed that challenge under the plain-error standard. See Fed. R. Crim. P. 52(b); *Johnson* v. *United States*, 520 U.S. 461, 466-467

(1997) (in order for an appellate court to correct an error that was not raised in the trial court, there must be (1) an error, (2) that is "plain," (3) that "affect[s] substantial rights," and (4) that "seriously affect[s] the fairness, integrity, or public reputation of judicial proceedings").

Petitioner suggests (Pet. 9-10, 12) that 18 U.S.C. 3742(f)(1) precludes a court of appeals from applying a plain-error standard of review to a sentencing error. That argument, which was not advanced below, lacks support in the text of Section 3742(f)(1) and the case law. In providing that a remand shall occur if a sentence "was imposed in violation of law," Section 3742(f)(1) does not preclude harmless-error or plain-error review under Rule 52 of the Federal Rules of Criminal Procedure. Section 3742(f)(1) and Rule 52 can, and should, be read together to require a remand only when a sentencing error has prejudiced the defendant. No court has read Section 3742(f)(1) to prohibit harmless-error and plain-error review of sentencing errors. Indeed, the D.C. Circuit has specifically rejected such a claim, noting that "the plain-error doctrine was well entrenched as a background legal principle when Congress acted, and we think it fanciful to suppose that Congress intended § 3742(f)(1) to override that doctrine." *United States* v. *Saro*, 24 F.3d 283, 286 (D.C. Cir. 1994), cert. denied, 519 U.S. 956 (1996); cf. *Jones* v. *United States*, 527 U.S. 373, 388-389 (1999) ("The statute [the Federal Death Penalty Act] does not explicitly announce an exception to plain-error review, and a congressional intent to create such an exception cannot be inferred from the overall scheme.").

2. Under the plain-error standard, the district court's error in imposing sentences above the otherwise-applicable statutory maximum, while "plain" in

light of *Apprendi*, did not affect petitioner's substantial rights or seriously affect the fairness, integrity, or public reputation of judicial proceedings. That is so for two independently sufficient reasons.

First, the evidence was overwhelming and essentially uncontroverted that each of petitioner's offenses involved a sufficient quantity of drugs to trigger a statutory maximum sentence in excess of the sentence actually imposed.

With respect to the cocaine counts, in order to authorize a maximum sentence of life imprisonment, an offense must involve at least 5 kilograms of cocaine. 21 U.S.C. 841(b)(1)(A)(ii). And, in order to authorize a maximum sentence of 40 years' imprisonment, an offense must involve at least 500 grams of cocaine. 21 U.S.C. 841(b)(1)(B)(ii). The court of appeals concluded that "there was overwhelming evidence that more than five kilograms were involved in the conspiracy," observing that, even if only the load seized in November 1999 was considered, the conspiracy would involve 422 kilograms of cocaine. Pet. App. 20a. The court also found essentially uncontroverted evidence that the two substantive cocaine offenses each involved more than 5 kilograms of cocaine. *Id.* at 21a (noting evidence that one count involved 422 kilograms and the other count involved 135 kilograms). Indeed, petitioner conceded at sentencing that his offenses involved 432 kilograms of cocaine. 8/4/00 Sentencing Tr. 7-9.

With respect to the marijuana count, in order to authorize a sentence of up to 240 months' imprisonment, an offense must involve at least 50 kilograms of marijuana. 21 U.S.C. 841(b)(1)(D). Here, the trial testimony of petitioners' two associates, Stephen Moore and Raymond Selke, established that petitioner possessed approximately 81 kilograms of marijuana. Pet. App.

23a. In any event, the court of appeals observed that, because petitioner's 240-month sentence on the marijuana count is to run concurrently with his 468-month sentences on the cocaine counts, any *Apprendi* error with respect to the marijuana count "had no effect on [petitioner's] sentence and thus did not prejudice him." *Id.* at 22a.[1]

In these circumstances, the district court's *Apprendi* error could not have "affected substantial rights" or "seriously affect[ed] the fairness, integrity, or public reputation of judicial proceedings." *Johnson*, 520 U.S. at 470 (no relief from plain error where element of offense that was not submitted to jury was "essentially uncontroverted" and the evidence supporting it was "overwhelming"); see, *e.g.*, *United States* v. *Nance*, 236 F.3d 820, 825-826 (7th Cir. 2000) ("If this jury was going to convict [the defendant] at all—which it plainly did—there is simply no way on this record that it could have failed to find" that the offense involved the enhancing quantity of drugs.), cert. denied, 122 S. Ct. 79 (2001); *United States* v. *Keeling*, 235 F.3d 533, 539-540 (10th Cir. 2000), cert. denied, 533 U.S. 940 (2001); *United*

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[1] In the superseding indictment, the marijuana count, unlike the three cocaine counts, did not allege a threshold drug quantity. On January 4, 2002, this Court granted certiorari in *United States* v. *Cotton*, No. 01-687 (to be argued Apr. 15, 2002), to consider the appropriate analysis of *Apprendi* challenges, raised for the first time on appeal, to sentences that exceed the otherwise-applicable statutory maximum based on a fact not alleged in the indictment. Petitioner does not request that the petition in this case be held for disposition in light of *Cotton*. Nor is there any valid reason to do so. As the court of appeals recognized, even if the marijuana count were disregarded, petitioner would be subject to the same total term of imprisonment.

States v. *Swatzie*, 228 F.3d 1278, 1283 (11th Cir. 2000), cert. denied, 533 U.S. 953 (2001).[2]

Second, petitioner was convicted of multiple drug and firearms offenses. His sentences for those offenses could (and should, if necessary, under the Sentencing Guidelines) run consecutively, in part, to produce the same total sentences that he actually received.

Under Section 5G1.2(d) of the Sentencing Guidelines, if no count of conviction is sufficient by itself to authorize imposition of the full term of imprisonment prescribed by the Guidelines, the district court is required to run the terms of imprisonment imposed on separate counts consecutively to the extent necessary to achieve the appropriate Guidelines sentence.[3] See 18 U.S.C. 3584 (permitting imposition of consecutive sentences). Consequently, when a defendant has been

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[2] Contrary to petitioner's assertions (Pet. 11), this Court's decision in *Glover* v. *United States*, 531 U.S. 198 (2001), does not advance his position that the *Apprendi* error in this case affected his substantial rights. In *Glover*, the Court held that any increase in a defendant's "amount of actual jail time" that results from his counsel's constitutionally deficient performance is sufficient to satisfy the prejudice requirement in a claim of ineffective assistance of counsel. 531 U.S. at 208. An *Apprendi* error does not, however, result in any increase in the "amount of actual jail time" where, as here, the defendant would have received the same sentence if he had been accorded the procedural protections required by *Apprendi*.

[3] Section 5G1.2(d) provides:

> If the sentence imposed on the count carrying the highest statutory maximum is less than the total punishment, then the sentence imposed on one or more of the other counts shall run consecutively, but only to the extent necessary to produce a combined sentence equal to the total punishment. In all other respects sentences on all counts shall run concurrently, except to the extent otherwise required by law.

convicted of multiple offenses, most circuits have affirmed sentences imposed in violation of *Apprendi* if the permissible maximum sentences for those offenses, run consecutively, would equal or exceed the defendant's actual total sentence. See, *e.g.*, *United States* v. *Angle*, 254 F.3d 514, 518-519 (4th Cir.) (en banc), cert. denied, 122 S. Ct. 309 (2001); *United States* v. *Kentz*, 251 F.3d 835, 842 (9th Cir.), cert. denied, 121 S. Ct. 1309 (2001); *United States* v. *Sturgis*, 238 F.3d 956, 960-961 (8th Cir.), cert. denied, 122 S. Ct. 182 (2001); *United States* v. *Price*, 265 F.3d 1097, 1108-1109 (10th Cir. 2001) (collecting cases), petition for cert. pending, No. 01-8242 (filed Jan. 30, 2002).

There is no conflict on this issue that warrants the Court's review at this time. Two circuits have taken a different approach to whether Section 5G1.2(d) of the Sentencing Guidelines can support affirmance of a sentence despite an *Apprendi* error. See *United States* v. *Vasquez-Zamora*, 253 F.3d 211, 214 (5th Cir. 2001) (holding that district court has discretion whether to run sentences consecutively or concurrently and remanding for district court to exercise its discretion); *United States* v. *Bradford*, 246 F.3d 1107, 1114-1115 (8th Cir. 2001) (per curiam) (similar). But the Eighth Circuit has granted rehearing en banc to consider the issue, see *United States* v. *Diaz*, 270 F.3d 741 (2001) (granting rehearing en banc in relevant part of decision reported as *United States* v. *Sherman*, 262 F.3d 784 (2001)), and the government has asked the Fifth Circuit to reconsider en banc the position taken in *Vasquez-Zamora* that stacking is discretionary, see Gov't Pet. for Reh'g, *United States* v. *Randle*, 259 F.3d 319 (2001). Moreover, even if a clear circuit conflict existed, disputes with respect to Guidelines interpretation may appropriately be left for resolution by the Sentencing

Commission. See *Braxton* v. *United States*, 500 U.S. 344, 348 (1991).

Here, petitioner was convicted of six offenses. The three cocaine counts each carried a statutory maximum sentence of 240 months' imprisonment without regard to drug quantity, see 21 U.S.C. 841(b)(1)(C); the marijuana count carried a statutory maximum sentence of 60 months' imprisonment without regard to drug quantity, see 21 U.S.C. 841(b)(1)(D); and the two firearms counts each carried a statutory maximum sentence of 120 months' imprisonment, see 18 U.S.C. 924(a)(2). Petitioner was subject to a total sentence of 360 months' to life imprisonment under the Sentencing Guidelines, and the district court imposed a sentence of 468 months' imprisonment. Under Section 5G1.2(d), if petitioner's sentence of 468 months' imprisonment could not be imposed on a single count (*e.g.*, because drug quantity was not submitted to the jury), the district court would be required to run the sentences on the separate counts consecutively, in part, to produce the same total sentence.

3. Petitioner contends that "at least eight other circuits" would have vacated his sentence and remanded for re-sentencing under the circumstances of this case. Pet. 12-13 (citing decisions of the Second, Fourth, Fifth, Sixth, Eighth, Ninth, Tenth, and D.C. Circuits). There is no conflict, however, that warrants this Court's review. Petitioner clearly would not prevail in six of those eight circuits, and, as noted above, the en banc process in the Fifth and Eighth Circuits may eliminate any conflict as applied to cases involving *Apprendi* errors in which sentences on multiple counts could be run consecutively under Section 5G1.2.

In a case involving *Apprendi* error and multiple counts of conviction, the Second Circuit has held that,

when consecutive sentencing under Section 5G1.2 would produce the same sentence, the error does not affect substantial rights, and relief under the plain-error rule is not warranted. *United States* v. *McLean*, No. 00-1342, 2002 WL 483474, at *7 (2d Cir. Mar. 28, 2002). The Fourth Circuit overruled the decision cited by petitioner and held that relief is not warranted when consecutive sentencing under Section 5G1.2 would produce the same sentence. *United States* v. *Angle*, 254 F.3d at 518-519. The Sixth Circuit has reached the same conclusion. *United States* v. *Page*, 232 F.3d 536, 544-545 (2000), cert. denied, 532 U.S. 935, 1023, and 1056 (2001). The Ninth Circuit has held that both overwhelming evidence and consecutive sentencing under Section 5G1.2 can justify the denial of relief for *Apprendi* error on plain-error review. *United States* v. *Buckland*, 277 F.3d 1173, 1183-1186 (2002) (en banc). The Tenth Circuit has held that, when sentences can be run consecutively under Section 5G1.2 to produce the same sentence that was actually imposed, no relief is warranted. *Price*, 265 F.3d at 1108-1109. And the D.C. Circuit has held that *Apprendi* error does not warrant relief on plain-error review when there is overwhelming evidence of the fact that the jury did not decide, in violation of *Apprendi*. *United States* v. *Webb*, 255 F.3d 890, 902 (2001).

In light of those decisions, and the continuing developments in the Fifth and Eighth Circuits, review of petitioner's claim is not warranted.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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